

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of

Implementation of the
Local Competition Provisions of the
Telecommunications Act of 1996

)
)
)
)
)
)

CC Docket No. 96-98

RECEIVED
MAY 26 1999
FCC MAIL ROOM

COMMENTS OF THE COMPETITIVE TELECOMMUNICATIONS ASSOCIATION

Carol Ann Bischoff
Executive Vice President
and General Counsel
COMPETITIVE TELECOMMUNICATIONS
ASSOCIATION
1900 M Street, N.W.
Suite 800
Washington, D.C. 20036

Robert J. Aamoth
Steven A. Augustino
Melissa M. Smith
KELLEY DRYE & WARREN LLP
1200 19th Street, N.W.
Suite 500
Washington, D.C. 20036
(202) 955-9600

Its Attorneys

No. of Copies rec'd
List ABCDE

012

DATED: May 26, 1999

SUMMARY

The purpose of this remand proceeding is for the FCC to “determine on a rational basis which network elements must be made available, taking into account the objectives of the Act and giving some substance to the ‘necessary’ and ‘impair’ requirements.” Critically, nothing in the Supreme Court’s decision upsets the decidedly pro-competitive purpose of Section 251(c)(3)’s network element requirement, and nothing strips the Commission of its authority to mandate unbundled network elements (“UNEs”) in order to promote competition. Indeed, the Court’s instruction to define UNEs with reference to the “objectives of the Act” requires the Commission to do so.

In these Comments, CompTel recommends that the Commission address the Court’s concerns regarding the standard applied to UNEs without disrupting the pro-competitive results sought in the *Local Competition Order*. It should do so by adopting a uniform, national list of UNEs to be unbundled, which are determined by a common sense reading of the “necessary” and “impair” requirements designed to promote competition by lowering entry barriers.

The Commission must be guided at all times by recognition that principal goal of the 1996 Act is to ensure that *all* pro-competitive entry strategies may be explored. Section 251(c)(3) creates a wholesale market entry option (one which is provided without regulatory obligation in competitive telecommunications markets) for competitors. The Act does not require entrants to own facilities, and although facilities deployment certainly is the long term objective of most CLECs, the Act does not favor such entry over the UNE option. Accordingly, the Commission’s interpretation of the “necessary” and “impair” standards must give substance to these standards without forcing carriers into a facilities-deployment model.

CompTel proposes that the impairment standard be interpreted to require for non-proprietary elements, there must be a *material* difference, either in cost, time to provision or in the number or scope of customers that can receive the service, derived from the use of ILEC UNEs as compared to externally supplied elements. Similarly, the necessary standard, which applies only in the limited circumstances when an element is “proprietary in nature,” should be interpreted to mean impairment, *plus* a material loss in functionality without access to the proprietary component of a network element. To protect against unnecessary claims of proprietary elements, the Commission should establish presumptions that elements subject to industry standards are not proprietary and limit claims of proprietary elements to those situations in which access to the element or component will disclose customer-specific information *other than* that which a carrier would receive from the carrier-customer relationship, or elements that disclose a method or procedure protected by ILECs’ own intellectual property rights

It is important to understand that the impair (or necessary) standards will be met unless and until a functioning wholesale market develops for the provision of network elements. No such market exists today, and one will not exist until ILEC provisioning systems are modified to make an externally supplied element fully *interchangeable* with the ILEC element in all material respects, including cost, ability to combine and scope of deployment.

Application of the necessary and impair standards yields a national list of UNEs in furtherance of Congress’ nationwide pro-competitive policy framework. This list should include all of the elements previously identified in Rule 319, with several modifications to clarify the utility of UNEs for the provision of advanced telecommunications services. Specifically, the Commission should (1) clarify that access to local loops encompasses all technically feasible transmission media, including high capacity loops (DS1, DS3, OC12, etc),

xDSL loops, and dark fiber, (2) modify the loop definition to permit CLECs to designate any technically feasible termination point for the loop, (3) clarify the local switching and transport UNEs to make clear they apply to packet networks, and (4) explicitly mandate unrestricted combinations of UNEs, including UNE-P and Extended Loops.

TABLE OF CONTENTS

	Page
I. THE AVAILABILITY OF ILEC UNES FURTHER THE ACT'S COMPETITIVE GOALS BY PROVIDING A WHOLESALE MARKET ENTRY STRATEGY	3
II. THE NECESSARY AND IMPAIR STANDARDS MUST BE INTERPRETED IN A MANNER THAT FURTHERS USE OF THE WHOLESALE MARKET ENTRY STRATEGY THROUGH UNES	8
A. "Impairment" Requires Only That There Be A Material Difference Derived From The Use Of Ilec Unes As Compared To Externally Supplied Elements.....	9
1. The Proposed Rule Answers the Court's Concern that Trivial Differences Might Require an Element to be Unbundled.....	9
2. The Impairment Standard Requires the Consideration of Whether Externally-Supplied Elements Are Interchangeable With ILEC Elements.....	14
B. The "Necessary" Standard	16
1. Definition of Elements which are "Proprietary in Nature"	17
2. The Definition of "Necessary"	19
C. Meaning Of Section 251(D)(2)'S Instruction To "Consider" These Factors	21
III. THE FCC SHOULD APPLY THE NECESSARY AND IMPAIR STANDARDS TO YIELD A NATIONAL LIST OF UNES.....	23
A. Uniform National Rules Are Needed to Achieve Section 251's Goals	23
B. Characteristics of a Requesting Carrier for Purposes of the Impairment Analysis.....	26
IV. APPLICATION OF THE NECESSARY AND IMPAIR STANDARDS COMPELS RETENTION OF ALL OF THE UNES DEFINED IN SECTION 319, WITH MODIFICATIONS TO ENSURE UNES ARE USEFUL FOR THE DELIVERY OF BROADBAND DATA SERVICES.	30
A. The Commission Must Retain All of the UNEs Originally Listed in Section 319, With Some Modifications.....	31
1. Local Loops	31
a. Description of the Element	31
b. Application of the "Impair" Standard	34
2. Network Interface Device ("NID").....	35
a. Definition of the Element.....	35
b. Application of the "Impair" Standard	36

TABLE OF CONTENTS
(continued)

	Page
3. Local Switching	37
a. Definition of the Element.....	37
b. Application of the “Impair” Standard	38
4. Interoffice Transport	41
a. Definition of the Element.....	41
b. Application of the “Impair” Standard	42
5. Signaling and Call-Related Databases	43
a. Definition of the Element.....	44
b. Application of the “Impair” Standard	44
6. Operations Support Systems (OSS)	45
a. Definition of the Element.....	45
b. Application of the “Impair” Standard	45
7. Operator Services/Directory Assistance	46
a. Definition of the Element.....	46
b. Application of the “Impair” Standard	46
B. To Avoid Any Further Delay In Exercising Requesting Carriers’ Rights To Combinations, The Commission Should Explicitly Mandate The Provision Of Une-P, Extended Link And Other Combinations.....	47
V. THE COMMISSION SHOULD ESTABLISH ORDERLY PROCEDURES FOR THE CONSIDERATION OF REMOVAL OF UNES	53
A. The Commission Must Retain Sole Authority To Remove Nationwide Unes From The List	53
B. The Commission Should Adopt A Procedure For Examining Unes That Includes Input From State Commissions	53
C. The Commission Must Provide An Orderly Transition For Unes That Are Removed From The Nationwide List	55
VI. CONCLUSION.....	58

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
Implementation of the)	CC Docket No. 96-98
Local Competition Provisions of the)	
Telecommunications Act of 1996)	
)	

COMMENTS OF THE COMPETITIVE TELECOMMUNICATIONS ASSOCIATION

The Competitive Telecommunications Association (“CompTel”), by its attorneys, hereby submits these comments on the *Second Further Notice of Proposed Rulemaking* (“*FNPRM*”) in the above-captioned proceeding.¹ With over 335 members, CompTel is the principal national industry association representing competitive telecommunications carriers. CompTel’s member companies include the nation’s leading providers of competitive local exchange services and span the full range of entry strategies and options. It is CompTel’s fundamental policy mandate to see that competitive opportunity is maximized for *all* its members, both today and in the future.

In these Comments, CompTel urges the Commission to lower barriers to local entry and to encourage the provision of integrated telecommunications service packages by adopting a uniform, national list of unbundled network elements (“UNEs”) to be provided everywhere. The central question for the Commission in determining whether to mandate the availability of a UNE should be whether the UNE will promote the rapid development of

¹ *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98, Second Further Notice of Proposed Rulemaking (1999)(“*FNPRM*”).

competition by a multitude of providers, *i.e.*, is availability of the UNE “rationally related to the goals of the [1996 Telecommunications] Act.”² Thus, CompTel advocates that the Commission conclude that a requesting carrier would be “impaired” by a denial of access to a UNE if use of an externally supplied element as compared to use of the incumbent local exchange carrier’s (“ILEC”) element exhibits a material difference in either cost, time to provision service, or the number or scope of customers to whom the service would be provided. Similarly, the “necessary” standard, which would apply only in limited circumstances, is met if the carrier would experience a material loss in functionality as a result of the absence of the proprietary element and if a requesting carrier would be impaired. Unless and until a functioning competitive market for the supply of wholesale network elements develops, either the “necessary” or “impair” standards will be met with respect to the features and functionalities integrated into the ILEC network.

CompTel submits that application of this standard compels the availability not only of the elements previously identified by the Commission, but also of elements useful for the provision of digital subscriber line (“DSL”) and other data services. For loops, switching and the other elements listed in Rule 319, use of an externally supplied alternative materially impairs a competitive local exchange carrier (“CLEC”), due principally to the fact that ILEC provisioning systems are not currently designed to provide interchangeability between integrated elements (*i.e.*, UNEs) and externally supplied elements performing the same functions. In addition, CompTel recommends several changes to the definitions of loops, switching and the network interface device (“NID”) to ensure nondiscriminatory access to high capacity loops (including dark fiber), DSL equipped and DSL capable loops, and packet switching functionalities.

² *AT&T Corp. v. Iowa Utils. Bd.*, 119 S. Ct. 721, 734 (1999).

Furthermore, experience since the Telecommunications Act of 1996 (“1996 Act” or “Act”)³ conclusively demonstrates that lack of access to UNE combinations, including the UNE Platform (“UNE-P”), impairs a CLEC’s ability to provide service in both business and residential markets.

Finally, CompTel is hopeful that, over time, the availability of wholesale alternatives will develop, and that some UNEs will no longer need to be required by the Commission. Indeed, for some network elements such as operator services and directory assistance, a wholesale market is emerging, albeit still limited by a need to rely on ILECs for critical inputs that are not yet available on a nondiscriminatory basis. Nevertheless, in order to prepare for the time when a carrier will not be impaired by denial of access to an ILEC element, the Commission should develop reasonable procedures for removing UNEs from the mandatory list. Although CompTel agrees that states can play an important advisory role in the process, the ultimate decision must be made by the Commission. CompTel recommends that the Commission establish procedures for examining changes in UNE availability, which should include a formal role for the state commissions. Moreover, the Commission must adopt reasonable transition rules for any “soon to be retired UNEs” so as not to overturn reliance interests or to disrupt customers served using such arrangements.

I. THE AVAILABILITY OF ILEC UNES FURTHER THE ACT’S COMPETITIVE GOALS BY PROVIDING A WHOLESALE MARKET ENTRY STRATEGY

The central goal of the 1996 Act is to establish competitive options for providers of local telecommunications services.⁴ As the Commission has recognized repeatedly, the Act

³ Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, *codified at* 47 U.S.C. §§ 151 *et seq.*

⁴ See S. Conf. Rep. No. 104-230, 104th Cong. 1 (1996) (explaining that the 1996 Act erects a “procompetitive deregulatory national framework designed to accelerate rapid private sector deployment of advanced telecommunications and information technologies and services to all Americans by opening all telecommunications markets to competition”).

explicitly requires three different market entry strategies – service resale, use of UNEs (wholesale entry) and facilities-based provision of service-- to be available.⁵ These options replicate market entry strategies available to carriers in competitive telecommunications markets, such as long distance.

The Act “neither explicitly nor implicitly expresses a preference for one particular entry strategy.”⁶ Instead, its goal is to eliminate all barriers to entry and to lower entry costs wherever possible, in order to maximize the potential competitive benefits to telecommunications subscribers. In short, the principal goal of the Act – and therefore, the Commission’s primary obligation in implementing the Act– is to “ensure that *all* pro-competitive entry strategies may be explored.”⁷

It is important to ensure the simultaneous availability of all three entry strategies. Each entry strategy has different strengths and weaknesses, and therefore is used for different purposes by different carriers (or in different circumstances by the same carrier). Moreover, the availability of all three entry strategies opens competition to the broadest array of providers and does not favor one type of service provider over another.

Service resale allows a carrier to enter at very low cost and often is the quickest method of entering a new market. However, service resale does not allow differentiation of service, nor does it allow an entrant to compete on value-added components. Moreover, service resale also can carry with it other regulatory limitations, such as (in the case of resale under Section 251(c)(4)), the inability to provide other services (such as access) to one’s own

⁵ See, e.g., *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98, First Report and Order, 11 FCC Rcd 15499, ¶ 12 (1996) (“*Local Competition Order*”).

⁶ *Id.*

⁷ *Id.*

customers. As a result, service resale is typically suited to entrants that believe they have developed more effective or lower cost marketing methods, or simply are more focused on providing a *related* service that is better marketed in conjunction with the resold service.

Use of UNEs provides a wholesale market entry strategy. This option, like service resale, also lowers the cost of entry, but does so in a way that gives the provider greater control over the network and an ability to offer new product and pricing packages to the market. Under this strategy, a new entrant will purchase underlying facilities or capacity from existing providers and utilize that capacity to provide its own service. The wholesale capacity can either be combined with other facilities leased or deployed by the entrant, or can be assembled into a stand-alone retail service consisting wholly of facilities leased from others. Use of UNEs allows a carrier to enter a market quickly, with little sunk costs, and to ramp up its customer base and traffic volumes over time.

A wholesale option (such as use of UNEs) encourages two types of service providers. First, wholesale facilities can be used by initial entrants, either those new to the industry entirely or those new to a particular geographic market. These carriers utilize wholesale facilities as a substitute for deployment of their own facilities, in order to speed their entry to a market or to lower the risk of underutilized or stranded facilities. Typically, wholesale facilities are only a temporary strategy for such carriers, and they gradually replace them with their own facilities.

Second, a wholesale option can be an efficient entry strategy for value-added providers who offer new or more effective ways of using existing infrastructure or technology. These providers typically have an innovative product or technology which, when used with

existing capabilities, produces greater benefits to customers.⁸ Value-added providers have no economic reason to duplicate existing infrastructure – and often are less skilled at doing so than are the incumbent providers. These entities simply need the underlying capability so that their new or innovative product can operate properly. For a value-added provider, wholesale entry can be a temporary entry strategy (to be replaced with the entrant's own facilities) or more permanent, if, for example, there are no significant benefits to vertical integration of the underlying facility and the value-added services.⁹

Finally, depending upon the legal, operational or economic barriers, facilities-based entry also is an entry strategy. Facilities-based entry is the most capital intensive entry strategy, and it also is the most time-consuming. It is used principally by mature carriers or entrants with the ability to subsidize significant up front losses from revenues from related endeavors.

Critically, in competitive telecommunications markets, each of these three options is available simultaneously, in essentially every geographic area. It is not the case that as a market becomes more competitive all providers migrate to a facilities-based strategy. In fact, the opposite is true. As the market becomes more competitive, one or more *wholesale* suppliers develop, and entry via wholesale facilities (*i.e.*, UNEs) expands. Just as tellingly, the wholesale option in competitive areas is founded on a principle of convenience – while wholesale capacity

⁸ This type of entry is illustrated by CompTel member companies such as Z-Tel Network Services, Inc. ("Z-Tel"), a carrier that focuses on the development of a sophisticated application control system that "overlays" the traditional network to provide customers an integrated voice, data and messaging environment. Essentially, Z-Tel uses the existing ILEC infrastructure in combination with its software in a creative manner to offer customers a new and innovative product. As Z-Tel's President, David Malfara, explains, use of the ILEC local exchange network is a critical component of Z-tel's application. *See Appendix C.*

may be *available* in a number of forms and increments, providers never *require* that their customers purchase capacity in its most skeletal form or in a manner where its usefulness is diminished.

Moreover, the availability of wholesale facilities promotes the expansion of competition. As wholesale facilities are available, it allows more competitors to enter a market. More competitors leads to more innovation and competition in software-related applications and the packaging of retail services. Many of the new competitors ultimately become facilities-based providers in their own right, thereby further increasing the availability of wholesale services in the market. For example, the Commission has credited the wholesale market as being “*a major reason* for the increased competition in the long distance services market.”¹⁰ The wholesale market enabled long distance carriers to enter the market at minimum cost, and to deploy their own facilities gradually as their needs and economic efficiency permit.

In the local market, the Act compels ILECs to be the wholesale providers because they are the only carriers in a position to do so. The ILEC networks enjoy “economies of density, connectivity, and scale” that cannot be duplicated by competitors, now or in the foreseeable future.¹¹ As has been widely acknowledged, and scarcely could be contested with a straight face, ILECs are “one of the last monopoly bottleneck strongholds in

(...continued)

Value added services would also include packages combining other related services, such as long distance service.

¹⁰ *Application of WorldCom, Inc. and MCI Communications Corporation for Transfer of Control of MCI Communications Corporation to WorldCom, Inc.*, FCC 98-225, ¶ 42 (Sept. 14, 1998) (emphasis added).

¹¹ *FNPRM*, ¶ 27 (citing *Local Competition Order*, ¶ 11).

telecommunications.”¹² In order for competitors to have a wholesale entry strategy in the local market today, they must obtain access to UNEs.

II. THE NECESSARY AND IMPAIR STANDARDS MUST BE INTERPRETED IN A MANNER THAT FURTHERS USE OF THE WHOLESALE MARKET ENTRY STRATEGY THROUGH UNES

In reviewing the Commission’s interpretation of Section 251(d)(2), the Supreme Court expressed concern that the Commission’s explanation of the applicable standard (1) disregarded the availability of outside elements; and (2) equated “impairment” with *any* increase in cost or decrease in service quality that results from the failure of a carrier to obtain access to an element, no matter how trivial.¹³ Discussing the level of impairment, the Court expressed concern that a trivial increase in cost might trigger the UNE requirement, even if, in the Court’s example, an entrant’s anticipated profits are reduced from 100 percent to 99 percent. However, the Court acknowledged that, in a situation where providers are offering service at marginal cost, any increase in cost (or decrease in quality) would constitute an impairment.¹⁴

Because it was not clear to the Court that the Commission applied the correct standard, it vacated Rule 319 and instructed the Commission “to determine on a rational basis which network elements must be made available, taking into account the objectives of the Act and giving some substance to the ‘necessary’ and ‘impair’ requirements.”¹⁵ The interpretation the Commission applies to the “necessary” and “impair” standards must be consistent with the Act’s purpose of promoting all three methods of competition, and, in particular, must affirmatively promote the wholesale market entry strategy through the use of UNEs.

¹² *Local Competition Order*, ¶ 4.

¹³ *AT&T Corp.*, 119 S.Ct. at 736.

¹⁴ *Id.* at 735.

¹⁵ *Id.* at 736.

A. “IMPAIRMENT” REQUIRES ONLY THAT THERE BE A MATERIAL DIFFERENCE DERIVED FROM THE USE OF ILEC UNES AS COMPARED TO EXTERNALLY SUPPLIED ELEMENTS

On remand, the Commission can address the Court’s two concerns directly and without disrupting the pro-competitive results sought in the *Local Competition Order*. With respect to the “impair” standard, CompTel proposes the following definition:

A carrier is impaired if a failure to obtain access to a network element would impose a material increase in cost, a material delay, or would materially restrict the number or scope of customers likely to receive the service any requesting carrier seeks to offer. Impairment would arise if, for example, any one of the following applied:

- (1) a denial would materially increase the cost to provision, combine, or otherwise utilize a requested network element in connection with other elements of the ILEC’s network or the network of an alternative provider,*
- (2) a denial would cause a requesting carrier to experience a material delay to provision, combine or otherwise utilize a network in connection with other elements of the ILEC’s network or the network of an alternative provider, or*
- (3) a network element exhibits material economies of scale and scope.*

This rule satisfies both of the concerns raised by the Supreme Court.

1. The Proposed Rule Answers the Court’s Concern that Trivial Differences Might Require an Element to be Unbundled

In determining whether to require unbundled access to a non-proprietary network element under the impairment standard, the Commission must develop, pursuant to the Court’s ruling, *some* limiting standard. As the Commission noted in the *Local Competition Order*, the

term “‘impair’ means to [] become worse or diminish in value.”¹⁶ The Commission explained that “an entrant’s ability to offer a telecommunications service is ‘diminished in value’ if the quality of the service the entrant can offer, absent access to the requested element, declines and/or the cost of providing the service rises.”¹⁷ In order to respond to the Court’s concern, however, the Commission must ensure that a negligible or inconsequential increase in cost, or decrease in quality, resulting from a denial of an element does not automatically constitute impairment.¹⁸

CompTel’s proposed definition incorporates a materiality test into the impairment standard that responds to the Court’s concern that trivial differences in cost would render an ILEC element a UNE. By incorporating a materiality test in the impairment standard, the Commission can ensure that its limiting standard is substantive, not trivial or insignificant.¹⁹

Although the materiality standard does not provide a precise quantification that can be applied ex ante to all circumstances, it does require that there be a significant or identifiable difference between the alternatives such that a requesting carrier would make a rational decision to use the ILEC element instead of another alternative.²⁰ In the *Local*

¹⁶ *Local Competition Order*, ¶ 285 (citing Random House College Dictionary).

¹⁷ *Id.*

¹⁸ *AT&T Corp.*, 119 S.Ct. at 734.

¹⁹ As a starting point, however, CompTel proposes a rule that a carrier’s ability to provide telecommunications service will be *presumptively* impaired by denial to a particular network element *unless* the Commission makes certain findings with respect to the provisioning and geographic availability of the network element as comparable in quality, cost and efficiency to that of the ILEC. See CompTel Proposed Rules, attached hereto as *Appendix A*. If this presumption does not apply, then the Commission would apply the impairment standard that incorporates the materiality test.

²⁰ Any “close calls” should be resolved in the favor of the requesting carrier in order to promote the Act’s goal of rapid development of competition. In such cases, the danger of improperly adding a UNE is inconsequential for, if a requesting carrier truly is not impaired, it presumably will prefer to supply its own element (or obtain it wholesale from (continued...))

Competition Order, the FCC defined impair using an ordinary and natural meaning of the word. Rather than discarding this approach entirely, CompTel proposes that the Commission should continue to give the term “impair” its ordinary meaning.

CompTel encourages the FCC to add some substance to the degree of impairment required under the standard, however. In other words, the Commission should continue to interpret impair to mean to “diminish in value,” only quantify that diminishment as “material” as opposed to “trivial.” As Justice Souter noted in dissent, “impairment” is an ambiguous term, which can mean any degree of impact depending upon its context.²¹ The Commission’s responsibility here is to match that degree of impact to the Act’s pro-competitive objectives. This is not hard to do. The Commission can respond to the Court’s concern by maintaining its common sense definition of impairment, with a materiality standard added.

Recently, the FCC reached a similar result when it interpreted the term “impair” in the context of the over-the-air reception provisions of the 1996 Act.²² There, the impairment concept was given a clear meaning as any regulation, ordinance, covenant or requirement that: (1) unreasonably delays or prevents installation, maintenance or use; (2) unreasonably increases the cost of installation, maintenance or use; or (3) precludes reception of an acceptable quality signal.²³

(...continued)

others) rather than rely on its largest competitor. Therefore, the likely result from improperly including a UNE will be that the element is available but unused.

²¹ *AT&T Corp.*, 119 S.Ct. at 739 (Souter, J., dissenting).

²² *See In the Matter of Otto and Ida M. Trabue Petition for Declaratory Ruling Under 47 C.F.R. § 1.4000*, Memorandum Opinion and Order, CSR-4974-O ¶ 17 (rel. May 19, 1999); Pub. L. 104-104, Title VII, § 207, Feb. 8, 1996, 110 Stat. 153 (requiring the Commission to “promulgate regulations to prohibit restrictions that impair a viewer’s ability to receive video programming services through devices designed for over-the-air reception of . . . direct broadcast satellite services”).

²³ *See* 47 C.F.R. § 1.4000(a).

This impairment standard is similar to CompTel's proposed interpretation of the UNE unbundling impairment standard in this proceeding. With respect to over-the-air reception devices, the Commission recognized that an entity is "impaired" by delays, cost increases or decreases in quality. These are the same factors CompTel proposes be considered in evaluating impairment with respect to UNEs. Moreover, in both standards, trivial differences are ignored. Like the concept of reasonableness in the context of over-the-air reception devices, the concept of materiality in CompTel's proposed UNE standard achieves the statute's objectives without erecting a barrier that is nearly impossible to meet or reducing the standard to an absurdity.

Importantly, CompTel's proposed impairment standard does not diminish a CLEC's incentives to deploy its own facilities. A rational new entrant will desire to reduce the burden of negotiating with, and relying upon, its primary competitor – the ILEC – for a critical input in order to do business. To this end, the CLEC will strive to replace this reliance with its own facilities as soon as possible. As the Commission told the Supreme Court in its Reply Brief, under a proper pricing regime (i.e., at Total Element Long Run Incremental Cost ("TELRIC") levels), "all new entrants, including those with access to the platform, will have powerful incentives to develop their own facilities whenever that would contribute to efficiency and consumer welfare."²⁴ That is, the availability of UNEs will not prevent CLECs from opting to construct facilities whenever it would be efficient to do so (*i.e.*, where traffic volumes justify substitution of one's own facilities, or where the new entrant needs new facilities to offer different or more efficient services.)²⁵

²⁴ See *FCC v. Iowa Utils. Bd.*, Case No. 97-826, et al, Reply Brief for the Federal Petitioners and Brief for the Federal Cross Respondents at 41 (U.S. Oct. Term 1997).

²⁵ See *Id.* at 34, citing G. Stigler, *The Theory of Price* (4th Ed. 1987).

Importantly, Justice Breyer's observation that meaningful competition flows from the unshared portions of an enterprise does not dictate that the ILEC network not be made available.²⁶ Rather, innovative and meaningful competition is possible, and in fact desirable, by requiring the ILEC to make that network available. For a new entrant that is a value-added provider, innovation occurs principally because the provider is *not* required to duplicate the ILEC UNEs, and is able instead to share the underlying network functionalities.²⁷ For example, Z-Tel Network Services, Inc. ("Z-Tel") is a competitor that focuses on the development of a sophisticated application control system that "overlays" the traditional network to provide customers an integrated voice, data and messaging environment.²⁸ The fundamental architecture is modeled after the basic Advanced Intelligent Network (AIN) framework. Essentially, Z-Tel uses the existing ILEC infrastructure in combination with its software in a creative manner to offer customers a new and innovative product.²⁹ This is innovation and competition made possible only where Z-Tel is not required to duplicate the ILEC network, but instead is able to share this essential resource. Indeed, if Z-Tel were unable to share the ILEC's network, its new application would be delayed.

²⁶ See *AT&T Corp.*, 119 S.Ct. at 754 (Breyer, J., dissenting).

²⁷ Such value-added would be realized, for instance, if the new entrant offered an existing service at a lower price, in a package with another service, or supported by a different billing or customer-support process. Value added, by definition, is in the "eye of the consumer" that will choose its local provider.

²⁸ See Affidavit of David Malfara, President of Z-Tel Network Services, Inc., appended hereto as *Appendix C*.

²⁹ That is, Z-Tel innovates through end user services and software applications, not through improved local network technologies.

2. The Impairment Standard Requires the Consideration of Whether Externally-Supplied Elements Are Interchangeable With ILEC Elements

The impairment standard also addresses the Court's concern that the test should examine alternatives available outside of the ILEC network. These alternative sources include self-provisioning, other CLECs or non-carrier service providers. However, the theoretical availability of a network element is not enough to preclude an element from being a UNE. In the *Local Competition Order*, the Commission rejected the argument that if a requesting carrier could, in theory, obtain an element from an outside source, then the ILEC need not provide the element.³⁰ This reasoning would nullify Section 251(c)(3). Indeed, Congress recognized that the duplication of an ILEC's network could not only delay entry, but also could be inefficient and unnecessary. Thus, Congress set the framework for competitors to be able to enter the local market through the purchase of UNEs. Moreover, for all practical purposes, the ILECs' existing infrastructure cannot be duplicated in the foreseeable future. For the most part, the ILECs' monopoly attributes -- economies of density, connectivity and scale -- remain intact.³¹

Similarly, one can imagine many ways of replicating an ILEC functionality through creative use of other telecommunications services. But Congress did not intend to mandate Rube Goldberg solutions to these problems. To illustrate this point, Justice Souter uses, and the majority notes the validity of, the following example: without a stepladder, one's ability to install a lightbulb is impaired, even though one could stand on a chair, a milk can or books instead.³² These latter options are not really reasonable options at all.

³⁰ *Local Competition Order*, ¶ 287.

³¹ *Local Competition Order*, ¶ 11 (noting that the local competition provisions of the Act require that these economies be shared with entrants.)

³² *AT&T Corp.*, 119 S.Ct. at 739 (Souter, J., dissenting); *see id.* at 735 n.11 (majority opinion).

For external elements (*i.e.*, facilities obtained outside the ILEC network), the Commission must consider how the element will work in connection with other elements provided by the ILEC and must consider material differences in cost, delay and scope in interconnecting and using the external element. CompTel submits that these factors will always lead to the conclusion that a requesting carrier is impaired until a functioning wholesale market develops for network elements.³³

In order for a wholesale market to develop, at least two changes must happen from today's conditions. First, external elements must become *interchangeable* with internal elements. This means not only that it is *possible* to interconnect and use an external element with ILEC elements, but also that the network architecture and provisioning systems are such that it is as easy to connect and use UNEs with the ILEC network as it is to connect and use the ILEC's element itself. ILEC architectures are not open today, and the focus of operational support systems ("OSS") development thus far has only been on automating the service order process, not on providing the automated provisioning of elements, particularly elements that are to be used in combinations with the externally supplied elements of CLECs. Second, there must be evidence of wholesale competition. That is, there must be evidence that multiple providers are holding themselves out to carriers on a wholesale basis and that sufficient excess capacity exists in these networks to present a meaningful alternative to the ILECs' provisioning of wholesale elements.

³³ Following a wholesale availability standard in this instance would, in large measure, replicate the Commission's actions over the past decades to promote competition in customer premises equipment ("CPE"), information services, and long distance services. Beginning with *Carterfone*, the Commission consistently has sought to promote competition by *expanding* the ability of competitive providers to gain access to the underlying telecommunications inputs necessary to provide services.

Notably, interchangeability depends principally on the type of element and the manner in which it operates within a telecommunications network. It is not likely to vary much based on the technical qualities of a network from one region to another, but instead is very much dependent upon the way in which ILEC provisioning systems are designed according to the principles of openness and interoperability. In order to achieve interchangeability, ILEC systems must provision and connect network elements to each other through means that eliminate all material differences in cost, time to provision and functionality between use of an ILEC network element and use of a competitively-supplied alternative.

With respect to cost, interchangeability requires that there be no material increase in development and deployment costs or material decrease in economies of scale between an ILEC network element and a competitive alternative. Alternative network elements must be accessible without significant modification to the competitive carrier's network and must be priced in a way that does not materially exceed the ILECs' charges.

With respect to functionality, interchangeability requires that (1) customers not be able to distinguish between the service offerings that use an alternative network element from those that use an ILEC network element (for example, that there be no material decrease in quality); and (2) the use of a competitive alternative not result in a material delay in the introduction of a competitive service offering in the market that adversely affects the competing carrier's service deployment strategy or consumer acceptance of the service.

B. THE "NECESSARY" STANDARD

Clearly, the necessary standard is closely related to impairment. In ordinary parlance, asking whether an element is necessary can be the flip side of asking whether a carrier is harmed or impaired by not having the element. Although the necessary test is distinct from the

impairment test, and applies only to *proprietary* elements as discussed below, the two standards are linked in that the concept of materiality and the factors that determine impairment play a role under each standard. Where they differ is only in the type of impairment that need be shown.

CompTel's proposed necessary standard is as follows:

Access to a network element that has a proprietary component is necessary if a material loss in the functionality of the network element would result without access to its proprietary characteristic and if the requesting carrier's ability to provide the intended service would otherwise be impaired in accordance with paragraph (b) below.

1. Definition of Elements which are "Proprietary in Nature"

Initially, it is important to note that the "necessary" standard is the exception, not the rule. Section 251(d)(2)(A) makes clear that it applies only to elements that are "proprietary in nature."³⁴ Indeed, the necessary standard is irrelevant for elements that are not proprietary. The Commission has reached the conclusion that the necessary standard applies only to proprietary elements, and the Court's decision does not alter this conclusion in any way.³⁵ Thus, for non-proprietary elements, the only standard that is applicable is the impairment standard.

In its *Local Competition Order*, the Commission defined elements that are "proprietary in nature" as those "with proprietary protocols" or "containing proprietary

³⁴ 47 U.S.C. § 251(d)(2)(A).

³⁵ See *FNPRM*, ¶ 19; *Local Competition Order*, ¶¶ 277-88; *Iowa Utils. Bd. v. FCC*, 120 F.3d 753 at 811 n. 31 (8th Cir. 1997), *granted sub nom.*, *AT&T Corp. v. Iowa Utils. Bd.*, 118 S.Ct. 879 (1998), *aff'd in part, rev'd in part*, 119 S.Ct. 721 (1999); *AT&T Corp.*, 119 S.Ct. at 734-36.

information.”³⁶ Despite the Court’s silence on the issue of the Commission’s interpretation of the term “proprietary,” the Commission seeks comment on the meaning of proprietary.³⁷

As a starting point, CompTel urges the Commission to define a presumption that any functionality that is subject to accepted industry standards cannot be proprietary, regardless of how the ILEC chooses to provide the element. CompTel agrees that ILEC signaling protocols that adhere to Telcordia (formerly Bellcore) standards are not proprietary because they use industry-wide, as opposed to ILEC-specific, protocols.³⁸ Similarly, network elements should be considered non-proprietary if the interfaces, features and capabilities sought by the requesting carrier are defined by recognized industry standard-setting entities, defined by Telcordia, or otherwise available from other vendors.³⁹

In the event that an element does not fall within this presumption, CompTel submits that “proprietary” should be defined more narrowly and in such a way as not to create incentives for the ILECs to litigate classification or to raise questionable claims of proprietary aspects. The Commission must guard against potential ILEC attempts to claim proprietary status simply as a delaying tactic or in order to escape their unbundling obligations. Unless the term is defined in such a way as to make it the exception, not the rule, litigation over whether elements are “proprietary in nature” will be interminable.

Accordingly, CompTel proposes that the Commission limit elements which are “proprietary in nature” to those that disclose customer-specific information *other than* that which a carrier would receive from the carrier-customer relationship, or elements that *disclose* a method

³⁶ *Local Competition Order*, ¶ 282.

³⁷ *FNPRM*, ¶ 15.

³⁸ *Local Competition Order*, ¶ 481.

³⁹ *FNPRM*, ¶15.

or procedure protected by ILECs' own intellectual property rights. Specifically, CompTel proposes that elements which are "proprietary in nature" be defined as follows:

A network element may be considered to be proprietary if the element:

- (i) discloses customer-specific information other than that which a carrier would receive from the carrier-customer relationship; or*
- (ii) discloses a method or procedure protected by the ILEC's own intellectual property rights.*

It is important to note that receiving the benefit of a new process is not enough under part (ii) of the proposed definition. In order for the element to be proprietary under the statute, the purchaser of the UNE must actually receive an unfair advantage by utilizing the element in terms of gaining the benefit of the proprietary process or method. In other words, the necessary standard only should apply when proprietary aspects of an element *must be disclosed* when it is unbundled, as opposed to merely be utilized. If unbundling an element will reveal a proprietary methodology or process that is protected by a registered patent or copyright, only then should it be considered proprietary. Again, the difference here is between merely obtaining the benefit of a proprietary methodology and revealing the methodology itself. In the latter case, the element is proprietary and the application of the necessary standard is appropriate.

2. The Definition of "Necessary"

In the rare circumstances where a UNE is "proprietary in nature," CompTel submits that necessary should be defined essentially as "impairment, plus." That is, necessary should be interpreted to mean that (1) the purchaser of the UNE will be impaired (the same impairment standard as discussed above) by a lack of access; *plus* (2) the UNE will experience a material loss in functionality without the aspect that is claimed to be proprietary.

In the *Local Competition Order*, the Commission examined the Section 251(c)(6) collocation equipment requirement and the meaning of the word “necessary.” In so doing, the FCC adopted a broad reading of the term “necessary.” The Commission concluded that ILECs are required to permit the collocation of equipment *used* for interconnection or access to UNEs.⁴⁰ This interpretation of necessary – “used” or “useful” as opposed to “indispensable” – is a broad interpretation that the Commission believed would most likely promote fair competition consistent with the purposes of the Act.⁴¹ In its March 1999 *Advanced Services First R & O*, the Commission relied upon this definition in expanding collocation options for competitive carriers.⁴² The Commission specifically noted that its implementation of the requirement in Section 251(c)(6) that ILECs permit collocation of “necessary” equipment was not challenged before the Supreme Court.⁴³ Thus, the Commission’s interpretation of “necessary” as “used or useful” remains in effect.

Congress’ use of the same term in Section 251(d)(2) should be given the same interpretation. The Commission has interpreted “necessary” to mean a prerequisite to competition, such that without access to certain proprietary elements, the ability of competitors to compete would be impaired or thwarted.⁴⁴ CompTel believes that it is reasonable to interpret both necessary and impair using common sense definitions and in a manner broad enough to promote UNE competition as envisioned in the Act.

⁴⁰ *Local Competition Order*, ¶ 579.

⁴¹ *Id.*

⁴² *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket No. 98-147, First Report and Order and Further Notice of Proposed Rulemaking ¶ 28 (rel. Mar. 31, 1999)(“*Advanced Services First R & O*”).

⁴³ *Id.*, ¶ 28 n. 57.

⁴⁴ *See Local Competition Order*, ¶ 282.

C. MEANING OF SECTION 251(D)(2)'S INSTRUCTION TO "CONSIDER" THESE FACTORS

The Commission has requested comment on whether, in addition to the necessary and impair standards discussed above, the agency has authority to consider factors *other than* the necessary or impair standards in determining whether a network element should be unbundled.⁴⁵ CompTel suggests that it may be necessary for the Commission to require the unbundling of an element even if the necessary and impair standards are not met. That is to say, the necessary and impair standards are not exclusive. The Commission may consider other factors such as the promotion of important statutory goals.

The Commission notes in the *FNPRM* that the requirement that the agency "consider" a particular factor means only that the Commission must "reach an express and considered conclusion" about that factor's importance.⁴⁶ Generally, the Commission is not required to attribute "any specific weight"⁴⁷ to a factor. The Supreme Court requires that, in considering the necessary and impair standards, the Commission must give "substance" to the standards.⁴⁸ Accordingly, CompTel suggests that the Court's concerns about the substance of the necessary and impair requirements would be addressed if satisfaction of the standards results in a presumption that the network element will be made available on an unbundled basis. Beyond this presumption, CompTel believes that *failure* to meet the necessary and impair standards should not end the analysis.

⁴⁵ *FNPRM*, ¶ 30.

⁴⁶ *FNPRM*, ¶ 29.

⁴⁷ *Time Warner Entertainment Co., L.P. v. Commission*, 56 F.3d 151, 175 (D.C. Cir. 1995).

⁴⁸ *FNPRM*, ¶ 29; *AT&T Corp.*, 119 S.Ct. at 735.

Section 251(d)(2) states that the Commission shall “consider, *at a minimum*,” whether access is necessary or whether lack of access would impair a requesting carrier’s ability to provide service.⁴⁹ The application of case law in this instance confirms that Section 251(d)(2) “does not restrict the factors” that the Commission may consider.⁵⁰ Further, as noted above, the FCC is not required to give a factor – here, the necessary and impair standards - any “specific weight,” or, indeed, any weight at all.⁵¹ Pursuant to Section 251(d)(2), then, the Commission has the discretionary authority, after it has determined that a UNE does not meet the test, to expand its consideration to include various other factors.

The various other factors that the Commission may, in its discretion, choose to consider include the goals of the Communications Act, as amended by the 1996 Act. For example, it may be advisable at some point for the Commission to require the provision of certain UNEs to further the 1996 Act’s express mandate of ensuring the promotion of universal service in Section 254. Or, it may become necessary for the Commission to use its discretion to require the provision of certain UNEs to further the development and deployment of advanced services pursuant to Section 706. Importantly, CompTel is not suggesting that the Commission’s discretionary authority to require the provision of a UNE to advance these purposes is unlimited, or that it should be exercised lightly. However, in some instances, specific statutory mandates of the Communications Act may only be furthered by the FCC’s discretionary implementation of the Act’s network element unbundling obligations.

⁴⁹ 47 U.S.C. § 251(d)(2)(A),(B) (emphasis added).

⁵⁰ *Central Vermont Railway, Inc. v. Commission*, 711 F.2d 331, 335 (D.C. Cir. 1983).

⁵¹ *Time Warner*, 56 F.3d at 175.